

**ENVIRONMENTAL PROTECTION**

**LAND USE MANAGEMENT**

**BUREAU OF MARINE WATER MONITORING**

**Shellfish Growing Water Classifications**

**Proposed Amendments: N.J.A.C. 7:12-1.1, 2.1, 3.2, 4.1 and 9.4**

Authorized By: Bradley M. Campbell, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-9 and 58:24-1 et seq.

DEP Docket Number:

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN -

Submit written comments (no later than 60 days following publication of this proposal) to:

Karen Hershey, Esq.,

DEP Docket Number:

Office of Legal Affairs

New Jersey Department of Environmental Protection

PO Box 402

Trenton, New Jersey 08625-0402

The agency proposal follows:

## **Summary**

As the Department of Environmental Protection (Department) has provided for a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5. The Department is proposing to amend its rules on the classification of certain shellfish beds as the result of surveys conducted by the Bureau of Marine Water Monitoring. The proposed amendments will result in the reclassification of approximately 830 acres, of which 510 acres will be upgraded and 320 acres will be downgraded. Hence, a net increase of 190 acres of harvestable shellfish waters is proposed.

Additionally, it has been noted that the word, conjunction has been replaced by the word, junction. By definition, the word conjunction usually refers to the joining of different words or phrases and the word junction usually refers to the point where two or more lines or roads meet or intersect. Therefore, the word junction has been substituted to maintain consistency throughout the regulations. Approximately 90% of the State's shellfishing waters are harvestable.

The proposed amendments to N.J.A.C. 7:12-3, Shellfish Growing Waters Classifications – Special Restricted, delineate those waters that are classified as Special Restricted. Shellfish from waters classified as Special Restricted may be utilized for human consumption only through one of the special permit programs under N.J.A.C. 7:12-9. The proposed amendments at N.J.A.C. 7:12-3.2 will upgrade portions of Barnegat Bay (High Bar Harbor area, 161 acres) from

Special Restricted to Approved and portions of Jarvis Sound (349 acres) from Special Restricted to Seasonally Approved.

N.J.A.C. 7:12-4, Seasonally Approved Shellfish Growing Waters, delineates those waters that are classified as Approved for the harvest of shellfish for part of the year and classified as Special Restricted for the remainder of the year. Under N.J.A.C. 7:12-4.1, certain waters are classified as Approved from November 1 through the following April 30 of each year. Under N.J.A.C. 7:12-4.2, certain other waters are classified as Approved from January 1 through April 30 of each year. The Department has established these different periods during which waters are classified as Approved based on pollution loading in the waters. The Department proposes to amend the classification of Havens Cove area (82 acres) from Approved to Seasonally Approved and a portion of Maurice River Cove (235 acres) from Approved to Seasonally Approved. Additionally, the Department is proposing to amend the classification of Island Beach State Park area (3 acres) from Approved to Seasonally Approved. This classification is for the purpose of establishing a marina buffer and is unrelated to water quality measurements. Specifically, N.J.A.C. 7:12-1.4 requires the Department to establish restricted harvest areas in the vicinity of marinas and/or boat mooring facilities. The restricted harvest area may be classified as Prohibited, Special Restricted, Seasonal Special Restricted or Seasonally Approved. The extent of the restricted area is based on a dilution analysis formula which includes marina occupancy rates. The marina buffer is required to protect shellfish from the effects of any marina pollutant loadings.

The proposed amendments revising classifications of certain shellfish beds are the result of surveys conducted by the Bureau of Marine Water Monitoring in the Department. In conducting these surveys, the Bureau collected and analyzed water samples, inventoried actual and potential sources of pollution, and performed hydrographic studies of flow patterns, which distribute pollution. These surveys were conducted in accordance with applicable State and Federal (Food and Drug Administration (FDA)) guidelines and regulations as described in the National Shellfish Sanitation Program "Guide for the Control of Molluscan Shellfish". The FDA further requires that each state annually appraise the quality of those waters classified as "Approved" for the harvest of shellfish. New Jersey conducts scientific investigations and research and pursuant to N.J.S.A. 58:24-1 et seq., revises the rules annually. The reclassifications reflect changes in water quality, enhanced monitoring, and development of additional marina buffers.

The names of the waterways and number of acres to be reclassified are listed below in general terms. (Note: Approved means waters meeting the sanitary requirements to allow year-round shellfish harvesting; Seasonal means waters meeting the sanitary requirements for harvesting part of the year; Special Restricted means waters not meeting the sanitary requirements to harvest except by special permit; and Prohibited means waters not meeting the sanitary requirements for shellfish harvesting).

Chart No.	Area	Action	Acres
4	Barnegat Bay (High Bar Harbor area)	Special Restricted to Approved	161
9	Jarvis Sound	Special Restricted to Seasonally	349

		Approved	
3	Barnegat Bay (Havens Cove Area)	Approved to Seasonally Approved	82
10	Delaware Bay (Maurice River Cove)	Approved to Seasonally Approved	235
4	Barnegat Bay (Island Beach State Park)	Approved to Seasonally Approved	3

The proposed reclassifications described above continue the general trend of improvement in statewide shellfish water quality.

Additionally, in N.J.A.C. 7:12-3.2(a)30ii, “junction” is proposed to be substituted for “conjunction” as the former term more accurately describes the point where two or more lines or roads, or, as used in these rules, waterways, meet or intersect.

### **Social Impact**

The proposed amendments will have a positive impact by upgrading more of the State’s shellfish growing waters. A direct connection exists between the consumption of shellfish harvested from contaminated areas and human illness. The last major incidence of a pollution-related illness linked to shellfish from New Jersey waters was in 1966. Since then greater emphasis has been placed on the classification of shellfish-producing waters. The National Shellfish Sanitation Program developed a manual of operations that became the guiding document in the sanitary control of shellfish harvest areas. New Jersey expanded the use of the special permit programs in the early 1970s. These programs capitalized on the natural ability of

shellfish to purge bacterial contamination when moved from a contaminated site to a clean site. Revisions to the rules governing these programs have been implemented over the years as technology has changed.

In addition to the more than 9,000 persons licensed to harvest shellfish who would have more waters available for shellfishing, the adoption of these amendments would benefit the far greater number of consumers who utilize the shellfish harvested from New Jersey waters. While the downgrading of specific waters may, in limited cases, reduce localized recreational opportunities, the net effect of adopting the amendments will be to increase such opportunities by making more waters available for harvest. The continued monitoring efforts undertaken by the Department ensure that the State's shellfish resource remains a wholesome food product, available to both recreational and commercial harvesters.

### **Economic Impact**

The Shellfish Growing Water Classification rules delineate the classification of the waters of the State for shellfish harvesting and the Special Resource Recovery programs under the National Shellfish Sanitation Program guidelines established by the Interstate Shellfish Sanitation Conference. The proposed amendments will ensure that the public health will continue to be protected and that those individuals harvesting and/or selling shellfish will be able to remain actively employed.

For several years, there has been a general trend of improvement in shellfish water quality. In each of the last 16 years, more acreage has been upgraded as a result of improved water quality. Much of the improved water quality has been in areas that have been off limits to shellfishing for several years. The resulting reclassifications will make available a new shellfish resource for harvest and direct marketing.

The shellfish growing water reclassifications contained in these amendments represent an increase in the availability of harvest water to shellfishermen. The overall economic impact of these regulatory changes is favorable to the shellfish industry while allowing the Department to fulfill its statutory responsibility to protect the public health.

The economic benefits of protecting public health from the potential of consuming contaminated shellfish have been recognized by the shellfish industry. Economic losses from illnesses associated with contaminated shellfish would be greater than the temporary loss from such closures.

### **Environmental Impact**

The continuous monitoring of New Jersey's shellfish growing waters benefits the State not only by affording protection from shellfish related disease, but also by serving as an environmental yardstick by which the progress of pollution abatement programs can be measured.

The proposed amendments represent a tangible measurement of the quality of New Jersey's surface waters as well as providing an historical record for future comparison. The proposed amendments will have a positive environmental impact by sanctioning the extensive monitoring efforts upon which the specific changes herein are based.

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq., (P.L. 1995, c 65), require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The proposed amendments are developed under public health control procedures of the National Shellfish Sanitation Program (NSSP). The NSSP is a tripartite cooperative program consisting of the States, shellfish industry and the Federal Food and Drug Administration. This cooperative program is managed through the Interstate Shellfish Sanitation Conference, which developed the sanitary control procedures defined in the Guide for the Control of Molluscan Shellfish. Each state has the responsibility to adopt laws and regulations consistent with the guidelines of the NSSP. The Food and Drug Administration is responsible for reviewing the state shellfish control program to ensure that it is consistent with all state shellfish control programs. These proposed amendments implement the NSSP guidelines and contain no standards or requirements that exceed the standards or requirements imposed by Federal law. Executive Order No 27(1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c.65), do not require further analysis.



### **Jobs Impact**

The Shellfish Growing Water Classification rules enable individuals to harvest shellfish from Approved and Seasonally Approved waters and through the special permit programs from Special Restricted waters. The proposed amendments to the classifications will result in a gain in acreage of water in which shellfishing may be conducted, and may increase shellfishing employment opportunities in the State.

### **Agricultural Industry Impact**

Pursuant to P.L. 1998, c.48, adopted on July 2, 1998, the Department has evaluated this rulemaking to determine the nature and extent of the proposed rule on the agriculture industry. The Department anticipates that the amendments, which concern shellfish harvesting water classification will have a positive effect upon agricultural concerns, as the proposed amendments will make more waters available for aquaculture programs.

### **Regulatory Flexibility Analysis**

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that the revision of these rules will not impose reporting, consultant, accounting or record keeping requirements on small business. The proposed

amendments delineate areas from which shellfish may be harvested and those areas from which shellfish may not be harvested. As discussed in the Summary above, the amendments result in a net upgrading of 190 acres of harvestable shellfish waters, to the benefit of licensed harvesters. No additional costs of compliance are anticipated, and no professional services will need to be employed to comply. As the amendments benefit licensees, no lesser requirements or exemptions are provided based on business size.

### **Smart Growth Impact**

Executive Order No. 4 (2002) requires State agencies which adopt, amend or repeal any rule to describe the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the proposed amendments' impact on smart growth and the implementation of the State Plan. The proposed amendments do not involve land use policies or infrastructure development and therefore, will not have any impact on the achievement of smart growth. The amendments are intended to protect public and environmental health which are goals of the State Plan. Accordingly, the reclassification of the State's water and shellfish resources are supportive of the goals of the State Plan.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

**7:12-3.2 Shellfish growing waters that are classified as Special Restricted**

(a) The following shellfish growing waters are classified as Special Restricted:

1. – 12. (No change.)

13. Barnegat Bay – Little Egg Harbor and Long Beach Island area; Barnegat Light to Holgate

(Note: A portion is also designated as Seasonal. See N.J.A.C. 7:12-4):

i. (No change.)

ii [All those waters of Barnegat Bay enclosed by a line beginning on the northernmost point of land forming the northern mouth of the most northerly lagoon located between Butler and Meadow Streets in High Bar Harbor (Long Beach Township) and bearing approximately 270 degrees T to the northeasternmost point of land on the northernmost of the two islands just offshore, (Edwin B. Forsythe National Wildlife Refuge-Barnegat Division) then bearing approximately 014 degrees T to the westernmost point of land at the northern extremity of the High Bar spoil area (also known as “The Dike”) where this line terminates;]

iii – iv. (No change.)

14. – 29. (No change.)

30. The Wildwoods area:

i. (No change.)

- ii. All of Sunset Lake south of a line beginning at a Department maintained marker at the end of Aster Street, Wildwood Crest and bearing approximately 290 degrees T to a Department maintained marker on the south end of Ephraims Island then bearing approximately 240 degrees T to a Department maintained marker at Shaw Island then along the shoreline in a westerly direction to a Department maintained marker then bearing approximately 273 degrees T across Shaw Cutoff to a Department maintained marker at the north side of the mouth of Stingaree Creek then across the mouth of Stingaree Creek to a Department maintained marker on the other side of Stingaree Creek then continuing in a westerly direction along the shoreline of Swain Channel and including Swain Channel to a Department maintained marker at the [conjunction] **junction** of Taylor Sound and Swain Channel. All that portion of Taylor Sound beginning at a Department maintained marker at the [conjunction] **junction** of Swain Channel and Taylor Sound then continuing along the shoreline in a northwesterly direction to Terrapin Thorofare and including Terrapin Thorofare, then continuing along the shoreline to a Department maintained marker at the north side of the mouth of Taylor Creek bearing approximately 213 degrees T to a Department maintained marker on the south side of the mouth of Jones Creek, then continuing along the shoreline in an easterly direction to a Department maintained marker on the west side of the mouth of Reubens Thorofare, then bearing 123 degrees T across the mouth of Reubens Thorofare to a Department maintained marker on the other side of Reubens Thorofare, then continuing easterly along the shoreline of Swain Channel to Jarvis Sound Thorofare and including Jarvis Sound Thorofare and continuing east to Old Turtle Creek and including Old Turtle Creek, then continuing in an easterly direction along the shoreline of Swain Channel to

an unnamed body of water known as the [Intercoastal] **Intracoastal** waterway (ICW) then turning in a southerly direction at the junction with the ICW and continuing along the shoreline of the ICW [into Jarvis Sound. All that portion of Jarvis Sound beginning at a Department maintained marker at the conjunction of the ICW and Jarvis Sound then continuing along the shoreline in a southerly direction to a Department maintained marker on the north side of the mouth of Meadow Creek then bearing approximately 239 degrees T to a Department maintained marker on the south side of Meadow Creek then continuing in a southerly direction to a Department maintained marker on the north side of the mouth of Punyard Creek and bearing approximately 222 degrees T across to a Department maintained marker on the south side of the mouth of Upper Thorofare then continuing along the shoreline in an easterly direction to a Department maintained marker on the west side of the mouth of Middle Thorofare bearing approximately 125 degrees T across the mouth of Middle Thorofare to a Department maintained marker on the other side, then again continuing east to a Department maintained marker on the west side of the mouth of Lower Thorofare and bearing approximately 084 degrees T across the mouth of Lower Thorofare to a Department maintained marker on the other side then continuing along the shoreline in a northerly direction to a Department maintained marker at the south side of the mouth of Shell Thorofare and bearing approximately 330 degrees T across the mouth of Shell Thorofare to the other side then continuing along the shoreline of the ICW in northerly direction and] **to Jarvis Sound at a point at latitude 38 degrees 58minutes 24.9 seconds N, longitude 74 degrees 51 minutes 41.7 seconds W, then bearing approximately 137 degrees T to a point at latitude 38 degrees 58 minutes 19.9 seconds N, longitude 74 degrees 51 minutes 35.6 seconds W**, then

turning in an easterly direction at the junction of the ICW and Sunset Lake then following the shoreline around back to a Department maintained marker at the point of origin and terminating.

- iii All of the waters from the south portion of Jarvis Sound from a point north of the mouth of Upper Thorofare at latitude 38 degrees 58 minutes 12.4 seconds N, longitude 74 degrees 52 minutes 39.1 seconds W, bearing approximately 222 degrees T across to a Department maintained marker on the south side of the mouth of Upper Thorofare then continuing along the shoreline in an easterly direction to a Department maintained marker on the west side of the mouth of Middle Thorofare bearing approximately 125 degrees T across the mouth of Middle Thorofare to a Department maintained marker on the other side then again continuing east to a Department maintained marker on the west side of the mouth of Lower Thorofare and bearing approximately 084 degrees T across the mouth of Lower Thorofare to a Department maintained marker on the other side then continuing along the shoreline in a northerly direction to a point at latitude 38 degrees 57 minutes 38.4 seconds N, longitude 74 degrees 51 minutes 56.6 seconds W., then bearing approximately 316 degrees T back to the point of origin and terminating.**

**7:12-4.1 Seasonally Approved growing waters (Approved November 1 through April 30 yearly, Special Restricted May 1 through October 31, yearly)**

(a)The following shellfish growing waters designated on the charts referred to in N.J.A.C. 7:12-1.1 shall be Special Restricted for the harvest of shellfish from May 1 through

October 31 yearly and Approved for the harvest of shellfish from November 1 through April 30 yearly:

1. – 2. (No change.)

3. Barnegat Bay Area:

i - ii (No change.)

**iii. Havens Cove: All those waters of Havens Cove, West of a line beginning on the northern side of an unnamed manmade waterway with coordinates of latitude 40 degrees 1 minute 49.8 seconds North and longitude 74 degrees 4 minutes 28.6 seconds West and bearing approximately 188 degrees T for .52 nautical miles toward a point just North of the most easterly tip of Havens Point with coordinates of latitude 40 degrees 1 minute 18.9 seconds North and longitude 74 degrees 4 minutes 34.6 seconds West. (This designation of Seasonally Approved waters directly adjoins those waters defined as Special Restricted in N.J.A.C. 7:12-3.2(a)8i).**

[iii.] **iv.** (No change.)

[iv.] **v.** (No change)

**vi. Island Beach State Park area: All those waters in Barnegat Bay from a point of land, Latitude 39 degrees 54 minutes 24 seconds N., Longitude 74 degrees 5 minutes 13 seconds W, then bearing approximately 254 degrees T to a Department maintained marker at Latitude 39 degrees 54 minutes 22 seconds N., Longitude 74 degrees 5 minutes 20 seconds W., then bearing 136 degrees T to a point of land at**

**Island Beach State Park at Latitude 39 degrees 54 minutes N., then continuing Northbound along the coast line to the point of origin and terminating.**

[vi.] **vii.** (No change.)

[vi.] **viii.** (No change.)

4. – 12. (No change.)

13. Delaware Bay:

i. – ii. (No Change.)

iii. Maurice River Cove: Seasonal Special Restricted May 1 through October 31 yearly, Approved November 1 through April 30 yearly.

(1) All those waters inside of a line beginning at the East Point Lighthouse and bearing approximately 270 degrees T to Can Buoy C7 then bearing approximately 165 degrees T to Flashing Green 2.5 second “5” (FL G 2.5 sec. “5”), then bearing approximately 188 degrees T to Flashing Green 4 second “3” (FL G 4 sec “3”, then bearing approximately [282 degrees T] **172 degrees T to a point at Latitude 39 degrees 10 minutes 23.3 seconds N., Longitude 75 degrees 2 minutes 20.0 seconds, then bearing approximately 291 degrees T** to a Department maintained marker at Latitude 39 degrees 11 minutes 6 seconds N., Longitude 75 degrees 04 minutes 50 seconds W., then bearing approximately 013 degrees T to a Department maintained marker on the shoreline west of the mouth of the Maurice River, then along the shoreline in a northeasterly direction to another Department maintained marker, then bearing approximately 137 degrees T to Can Buoy C7, then bearing approximately 090 degrees T to the East Point Lighthouse and terminating; and



(2) (No change.)

iv. – vii. (No change.)

**7:12-4.2 Seasonally Approved growing waters (Approved January 1 through April 30 yearly, Special Restricted May 1 through December 31 yearly)**

(a) The following shellfish waters designated on the charts referred to in N.J.A.C. 7:12-1.1 shall be Special Restricted for harvest of shellfish from May 1 through December 31 yearly and Approved for the harvest of shellfish from January 1 through April 30 yearly:

1. – 9. (No change.)

**10. The Wildwoods area:**

**All of the portion of Jarvis Sound beginning at a point at latitude 38 degrees 58minutes 25.0 seconds N, longitude 74 degrees 51 minutes 41.8 seconds W, then continuing along the shoreline in a southerly direction to a Department maintained marker on the north side of the mouth of Meadow Creek then bearing approximately 239 degrees T to a Department maintained marker on the south side of Meadow Creek then continuing in a southerly direction to a Department maintained marker on the north side of the mouth of Punyard Creek and bearing approximately 222 degrees T across to a point north of the mouth of Upper Thorofare at latitude 38 degrees 58 minutes 12.5 seconds N, longitude 74 degrees 52 minutes 39.1 seconds W, then bearing approximately 136 degrees T to a point at latitude 38 degrees 57 minutes 38.4 seconds N, longitude 74 degrees 51 minutes 56.6 seconds W, then continuing along the shoreline in a northerly direction to a Department maintained marker at the south side of the mouth of Shell Thorofare**

and bearing approximately 330 degrees T across the mouth of Shell Thorofare to the other side then continuing along the shoreline of the ICW in a northerly direction to a point at latitude 38 degrees 58 minutes 20.0 seconds N, longitude 74 degrees 51 minutes 35.7 seconds W, and bearing approximately 317 degrees T back to the point of origin and terminating.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Statement addressing the requirements of Executive Order No. 27 (1994), permit the public to understand accurately and plainly the purposes and expected consequences of these proposed amendments. I hereby authorize the proposal of these amendments.

DATE: \_\_\_\_\_

Bradley M. Campbell, Commissioner

Department of Environmental Protection